Indiana Public Defender Council

DEFENDING MOLEST AND OTHER OFFENSES INVOLVING A CHILD VICTIM

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I. SUFFICIENCY OF EVIDENCE

A. Penetration – Level 1/Class A Felony

"Proof of the slightest penetration of the sex organ, including penetration of the external genitalia, is sufficient to demonstrate a person performed other sexual conduct with a child."[1] The State is not required to prove intent to arouse or satisfy sexual desires in order to obtain a Level 1 felony conviction.[2]

1. Evidence Insufficient

Neither touching, massaging, nor "rubbing around" the vagina constitutes penetration of a sex organ for Level 1 Felony molestation.[3]

Evidence insufficient where only evidence presented was that D used his "whole hand" to rub "up and down" on the "outside" of victim's "private part."[4]

Because victim was of age to understand and respond to questions, did not state that penetration occurred and there was no medical or physical evidence of penetration, evidence was insufficient to support enhancement of charge against D to Class A felony.[5]

For a threat to elevate molestation charge to Class A/Level 1 Felony, the threat must be used to coerce or otherwise facilitate the offense, not aid in maintaining the victim's silence afterwards.[6]

While an inappropriate touching clearly took place, the evidence, specifically victim's testimony, was insufficient to permit a jury to infer beyond a reasonable doubt that D inserted an object into victim's sex organ as charged.[7]

Neither pathologist's testimony nor D's statement established that the object that caused obliteration of victim's hymen was a penis.[8]

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[1] Boggs v. State, 104 N.E.3d 1287, 1289 (Ind. 2018).

[2] D'Paffo v. State, 778 N.E.2d 798 (Ind. 2002).

[3] Adcock v. State, 22 N.E.3d 720, 730 n.7 (Ind. Ct. App. 2014).

[4] Austin v. State, 201 N.E.3d 1184 (Ind. Ct. App. 2022).

[5] Spurlock v. State, 675 N.E.2d 312 (Ind. 1996).

[6] Id.

[7] Krebs v. State, 816 N.E.2d 469 (Ind. Ct. App. 2004).

[8] Davies v. State, 730 N.E.2d 726 (Ind. Ct. App. 2000).

Evidence insufficient where only evidence presented was that D rubbed his penis against or between victim's buttocks, but no evidence showed that D touched the victim's anus.[9]

2. Evidence Sufficient

Victim's testimony that D toucher her "front private" first over her underwear and then under her underwear was sufficient for attempted Class A Felony child molestation and engaged in an overt act constituting a substantial step towards penetrating victim's sex organ with his finger.[10]

Victim's testimony that D touched her "vagina" was enough to establish the element of penetration.[11]

Touching clitoral hood with finger supported jury's finding that D penetrated victim's sex organ, despite victim being unable to recognize or verbalize the clitoral hood as an interior part of the female sex organ.[12]

Evidence sufficient of penetration despite victim's inconsistent statements and complete lack of physical evidence. [13]

DNA found on C.W.'s anus along with direct evidence of non-consensual sex was sufficient to support criminal deviate conduct conviction.[14]

Evidence led to reasonable inference that D inserted his penis into victim's anus, causing him pain.[15]

B. Other Elements

1. Polygraph

An incriminating polygraph alone will be insufficient to sustain a conviction.[16]

2. Incredible Dubiosity Rule

Victim's testimony that D molested her while her entire family was sleeping in the same room was not so inherently improbable that no reasonable person could believe it.[17]

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[9] Downey v. State, 726 N.E.2d 794 (Ind. Ct. App. 2000).

[10] Boling v. State, 982 N.E.2d 1055 (Ind. Ct. App. 2013).

[11] Hale v. State, 128 N.E.3d 456 (Ind. Ct. App. 2019).

[12] Stetler v. State, 972 N.E.2d 404, 407-08 (Ind. Ct. App. 2012).

[13] Smith v. State, 779 N.E.2d 111 (Ind. Ct. App. 2002) and Mastin v. State, 966 N.E.2d 197 (Ind. Ct. App. 2012).

[14] Lewis v. State, 34 N.E.3d 240 (Ind. Ct. App. 2015).

[15] Wisneskey v. State, 736 N.E.2d 763 (Ind. Ct. App. 2000).

[16] A.H. v. State, 941 N.E.2d 559 (Ind. Ct. App. 2011).

[17] Leyva v. State, 971 N.E.2d 699 (Ind. Ct. App. 2012).

3. Age of Defendant

When D had his 19-year-old girlfriend molest the child she baby-sat and take pictures of the acts, there was sufficient evidence to support his conviction for Class A felony child molesting, as his offense was properly classified as a Class A felony because of his age even though his girlfriend was convicted of a Class B felony because of her age.[18]

In Chastain v. State, 144 N.E.3d 732 (Ind. Ct. App. 2020), the defendant's conviction was improperly elevated based on defendant's age at the time of molesting a child because the only evidence offered to support the elevation was inadmissible hearsay consisting of testimony about information contained in motor vehicle records. But in Brown v. State, 149 N.E.3d 322 (Ind. Ct. App. 2020), the defendant's age was proved by circumstantial evidence where testimony showed he was "bald in the middle at the top and hair in the back with a white beard," owned three cars, worked as a handyman, had a house, and cared for six to ten children at a time.

4. Offenses committed before/after victim's death

That D may have waited until after victim's death to place object in her vagina is of no moment where record supported inference that D committed act of sexual deviate conduct by engaging in force against victim while she was still alive.[19]

C. Fondling – Level 4/Class C Felony

Mere touching alone is not sufficient to constitute crime of child molesting by fondling. The State must also prove beyond reasonable doubt that act of touching was accompanied by specific intent to arouse or satisfy sexual desires.[20]

1. Insufficient

Insufficient evidence of intent to arouse where D undressed child except for her shirt, hung her upside down on nail, and tickled her under the arms.[21]

2. Sufficient

Two instances of inappropriate touching along with circumstantial evidence of D's intent, based on his statements to child, were sufficient to support conviction.[22]

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[18] Schroeder v. State, 998 N.E.2d 279 (Ind. Ct. App. 2013).

[19] Hampton v. State, 873 N.E.2d 1074 (Ind. Ct. App. 2007).

[20] Nuerge v. State, 677 N.E.2d 1043 (Ind. Ct. App. 1997).

[21] Clark v. State, 695 N.E.2d 999 (Ind. Ct. App. 1998).

[22] Kanady v. State, 810 N.E.2d 1068 (Ind. Ct. App. 2004). See also Rodriguez v. State, 868 N.E.2d 551 (Ind. Ct. App. 2007).

Victim's testimony that D repeatedly put his hand in her pants and touched her genitals was sufficient evidence of intent to arouse or satisfy D's sexual desires, despite telling child advocate that D was sleeping and testifying that she could not see D's eyes.[23]

Sufficient evidence of attempted child molest where D, wearing only boxers, knelt next to child as she slept on the couch and pushed her blanket up past her waist and positioned her shorts such that her crotch was visible while having one hand on his crotch; D went beyond sexual gratification because D did more than touch himself; he pushed the blanket up, looked at her crotch, and would have touched her had her mother not appeared.[24]

D. Juvenile Cases

It is unreasonable to infer intent to satisfy or arouse sexual desire solely from the fact that a child intentionally touched another child's genitals, given that children may experiment by looking at or touching another child's genitals. Other circumstances must be present that indicate such intent.[25]

A child cannot "molest" a child of the same age or who is older.[26]

C.D.H. v. State, 860 N.E.2d 608 (Ind. Ct. App. 2007) (testimony of victim's father that he "believed" D to be 11 years old was insufficient to prove age where trial judge said, when pronouncing verdict, that D was 10 years old).

Minors under the age of fourteen can be adjudged to be juvenile delinquents pursuant to child molesting statute; there is nothing in the statute to indicate legislative intent to exclude offending persons under fourteen years of age, or to set a minimum age for the perpetrator of offense.[27]

E. Sexual Misconduct with a Minor

Hmurovic v. State, 43 N.E.3d 685 (Ind. Ct. App. 2015) (Court reversed D's conviction for sexual misconduct with a minor, where C.W. testified she did not remember having sex with D prior to her 16th birthday and D's videotaped interrogation did not establish that activity with C.W. began when she was 14 or 15 of age; C.W.'s prior inconsistent statement to social worker at hospital could not be used by jury as substantive evidence to prove her age).

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[23] Amphonephong v. State, 32 N.E.3d 825, 833 (Ind. Ct. App. 2015).

[24] Bass v. State, 947 N.E.2d 456 (Ind. Ct. App. 2011).

[25] T.G. v. State, 3 N.E.3d 19, 24 (Ind. Ct. App. 2014) and D.P. v. State, 80 N.E.3d 913 (Ind. Ct. App. 2017).

[26] C.D.H. v. State, 860 N.E.2d 608 (Ind. Ct. App. 2007).

[27] State v. J.D., 701 N.E.2d 908 (Ind. Ct. App. 1998).

F. Child Solicitation/Seduction

Crime of attempted child solicitation is established in case of one who engages in overt act that constitutes a substantial step toward soliciting someone believed to be a child under 14 to engage in sexual activity, even if it turns out solicited person is an adult.[28]

> Kuypers v. State, 878 N.E.2d 896 (Ind. Ct. App. 2008) (evidence that D engaged in an online chat with a believed to be 15-year-old girl, in which he neither specifically asked her to do anything nor made specific arrangements to meet in person, was sufficient to support D's conviction for child solicitation).

A school bus driver working for an independent contractor under contract with school corporation did not fall within definition of "childcare worker" for purposes of child seduction statute.[29]

G. Dissemination of Matter Harmful to Minors

The offense of Attempted Dissemination of Matter Harmful to Minors can be committed when a person attempts to transmit proscribed matter by the Internet to an adult police detective posing as a minor. It is no defense to a crime of attempt that, because of a misapprehension of the circumstances, it would have been impossible for the accused person to commit the crime attempted.[30]

> State v. Thakar, 82 N.E.3d 257 (Ind. 2017) (statute prohibiting dissemination of matter harmful to minors was not unconstitutionally vague or ambiguous as applied to D, who electronically transmitted photo of his erect penis to 16-year-old girl in Oregon).

H. Others

Delagrange v. State, 5 N.E.3d 354 (Ind. 2014) (evidence was sufficient to support D's convictions for attempted child exploitation, where he used a camera attached to his shoe to record digital images of areas under minors' skirts and dresses).

Sargent v. State, 875 N.E.2d 762 (Ind. Ct. App. 2007) (in incest prosecution, trial court did not err in considering D's lack of eye contact and demeanor with daughter/victim when finding that D committed incest against victim).

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[28] Laughner v. State, 769 N.E.2d 1147 (Ind. Ct. App. 2002), *abrogated in part on other grounds by* Fajardo v. State, 859 N.E.2d 1201 (Ind. 2007).

[29] Smith v. State, 867 N.E.2d 1286 (Ind. 2007).

[30] King v. State, 921 N.E.2d 1288 (Ind. 2010).

II. CHARGING INFORMATION/AMENDMENTS -- VARIANCE

Where it is impossible to tell whether molestation victim was above or below dividing line at time of offense, the State may charge and convict D of the lesser felony.[31]

Time is not of essence in information alleging child molesting unless age of victim at time of offense serves to elevate the charged offense,[32] or the offense was committed around the time of the criminal code overhaul on July 1, 2014.[33]

Neither State nor federal prohibitions against double jeopardy are violated where the charging information contains two identically worded counts of child molesting.[34]

A fatal variance between the charging information and proof adduced at trial can be grounds for reversal.[35]

> Broude v. State, 956 N.E.2d 130 (Ind. Ct. App. 2011) (material variance between charging information which alleged D forced child to place her finger in his anus and proof at trial—that D placed pair of tweezers in child's rectum—required reversal).

Sexual Battery is not a lesser included offense of child molesting as a Class B Felony.[36] But attempted child molesting is an included offense, and due process rights are not violated if a defendant is found guilty of attempted child molestation, even if only charged with the completed act.[37]

A. Amended Charging Information

> Garner v. State, 754 N.E.2d 984 (Ind. Ct. App. 2001) (charging information which narrowed the range of dates to five months charged D with adequate specificity to allow him to prepare a defense), *sum. aff'd in relevant part by* 777 N.E.2d 721 (Ind. 2002).
>
> Harris v. State, 992 N.E.2d 887 (Ind. Ct. App. 2013) (after jury acquitted D of rape and hung on class C felony sexual misconduct with a minor charge, statute of limitations barred State from amending sexual misconduct charge by adding deviate sexual conduct as alternative basis for charge).
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> Thomas v. State, 840 N.E.2d 893 (Ind. Ct. App. 2005) (State's amendment of information charging child molest after State rested did not confuse jury or prejudice D, as amendments

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[31] Adcock v. State, 22 N.E.3d 720 (Ind. Ct. App. 2014).

[32] Hillenburg v. State, 777 N.E.2d 99 (Ind. Ct. App. 2002); Barger v. State, 587 N.E.2d 1304 (Ind. 1992).

[33] Keister v. State, 203 N.E.3d 348 (Ind. Ct. App. 2023)

[34] Rexroat v. State, 966 N.E.2d 165 (Ind. Ct. App. 2012)

[35] Oberst v. State, 748 N.E.2d 870 (Ind. Ct. App. 2002); Allen v. State, 720 N.E.2d 707 (Ind. 1999).

[36] Childs v. State, 886 N.E.2d 75 (Ind. Ct. App. 2008).

[37] Ocelotl-Toxqui v. State, 793 N.E.2d 271 (Ind. Ct. App. 2003).

reduced number of charges to 20 counts and were more specific as to where incidents happened and what occurred).

III. MOTION TO DISMISS – CONSTITUTIONAL CHALLENGES

Indiana's child molesting statute does not violate Privileges & Immunities Clause of Art. 1, Sec. 23 of Indiana Constitution—increased punishment for child molesters who are at least 21 years old is reasonably related to inherent characteristics which distinguish two age groups at issue.[38]

When the defendant's age is an element of a crime, D does not waive the sufficiency issue by not filing a motion to dismiss on the ground that he is not of the required age.[39]

A. Vagueness

W.C.B. v. State, 855 N.E.2d 1057 (Ind. Ct. App. 2006) (Court rejected vagueness challenge to child molest statute as applied to juvenile who was under 14 years of age at time of alleged incident and three years older than victim, despite juvenile's contention that statute granted unfettered discretion to the prosecutor to decide which participant to charge where both participants were under the age of 14).

T.G. v. State, 3 N.E.3d 19 (2014) (Court rejected argument that Indiana's child molesting statute is unconstitutionally void for vagueness and fails to provide notice of conduct prohibited for children who might not know that prohibited touching is of a sexual nature; here, evidence was sufficient to establish that 11 year-old T.G.'s touching or fondling on 6 year-old C.W. was committed with intent to arouse or satisfy T.G.'s sexual desires).

State v. Thakar, 82 N.E.3d 257 (Ind. 2017) (dissemination of harmful matter statute not unconstitutionally vague with respect to an adult transmitting sexual, non-obscene images to 16-year-old, even if that adult could not be prosecuted for child seduction).

B. Overbreadth

Logan v. State, 836 N.E.2d 467 (Ind. Ct. App. 2005) (Indiana's child pornography and exploitation statute was not unconstitutionally overbroad in relation to specific facts of case).

Cf. Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (statute prohibiting production of sexual images of children created by computer was unconstitutionally overbroad).

LaRose v. State, 820 N.E.2d 727 (Ind. Ct. App. 2005) (I.C. § 35-42-4-6, which prohibits solicitation of "an individual the person believes to be a child under fourteen (14) years of age," is narrowly drawn, serves two compelling state interests and is constitutional).

[38] Cowart v. State, 756 N.E.2d 581 (Ind. Ct. App. 2001).

[39] Staton v. State, 853 N.E.2d 470 (Ind. 2006).

IV. DEFENSES

A. Romeo and Juliet Defense

In child molest cases, it is a defense that the defendant reasonably believed the child was 16 years of age or older at the time of the conduct.[40] The mistake of fact defense is available to any defendant who reasonably believes victim to be of such age that activity engaged in was not criminally proscribed.[41] Indiana's "Romeo and Juliet" statute[42] generally allows an affirmative defense to a sexual misconduct with a minor charge for someone who is less than four years older than the victim and who is in an ongoing or dating relationship with the victim. The person asserting the defense must not have "committed a sex offense...including a delinquent act that would be a sex offense if committed by an adult...against any other person."[43]

Previous sex offense against the same victim does not preclude "Romeo and Juliet" defense.[44]

B. Statute of Limitations

The State can be barred from prosecuting the defendant even if he fails to raise a statute of limitations defense at trial.[45] The period in which the prosecution must be commenced does not include any period in which D conceals evidence of offense, and evidence sufficient to charge him with that offense is unknown to prosecuting authority and could not have been discovered by exercise of due diligence.[46] The tolling period ends and the limitations period begins to run when the prosecuting authority becomes aware or should have become aware of sufficient evidence to charge the defendant, not when the alleged molestations ceased.[47]

V. SEVERANCE OF CHARGES

A common modus operandi and motive (i.e., to fulfill sexual desires) can sufficiently link crimes committed against different victims.[48]

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[40] Ind. Code § 35-42-4-3(c).

[41] Lechner v. State, 715 N.E.2d 1285 (Ind. Ct. App. 1999).

[42] Ind. Code § 35-42-4-9(e).

[43] Ind. Code § 35-42-4-9(e)(4).

[44] Beedy v. State, 58 N.E.3d 987 (Ind. Ct. App. 2016).

[45] Jewell v. State, 877 N.E.2d 864 (Ind. Ct. App. 2007), *aff'd in relevant part by* 887 N.E.2d 939 (Ind. 2008). See also Baumholser v. State, 186 N.E.3d 684 (Ind. Ct. App. 2022).

[46] Ind. Code § 35-41-4-2(h)(2).

[47] Sloan v. State, 947 N.E.2d 917 (Ind. 2011).

[48] Ind. Code § 35-34-1-11(a).

Pierce v. State, 29 N.E.3d 1258 (Ind. 2015) (D not entitled to separate trials as of right where he committed child molesting crimes in substantially the same way against similar victims by exploiting position as trusted grandfather and molesting young female family members in his care, which produced overlapping evidence); See also Ennick v. State, 40 N.E.3d 868 (Ind. Ct. App. 2015).

Vasquez v. State, 174 N.E.3d 623 (Ind. Ct. App. 2021) (D not entitled to severance as of right when he sexually abused young female family members who stayed in his house and actions resulted in overlapping investigations; D also not entitled to discretionary severance because evidence as to each of two victims was easily distinguishable).

Piercefield v. State, 877 N.E.2d 1213 (Ind. Ct. App. 2007) (D not entitled to severance as of right when children he molested were in his care at the time, he had previously showered with them and made them give massages, showing abuse was handiwork of same person). See also Booker v. State, 790 N.E.2d 491, 494 (Ind. Ct. App. 2003).

VI. DISCOVERY ISSUES

A. Brady Violations

Turney v. State, 759 N.E.2d 671 (Ind. Ct. App. 2001) (in child molesting prosecution, State committed Brady violation where it did not disclose C.W.'s prior sexual misconduct after introducing evidence of child sexual abuse accommodation syndrome, which made disclosure mandatory; D should have been made aware of C.W.'s prior sexual misconduct under Brady because it could have been used for impeachment purposes & went to credibility of victim).

B. Discovery of Confidential Reports

Discovery is limited only as far as necessary for the resolution of the case but must be reviewed first by the court in an *in-camera* inspection to determine whether the defense may discover the documents.[49]

Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989 (1987) (when D has been denied access to confidential child protective services' files, due process entitles D to have files reviewed *in camera* by trial court to determine if they contain any exculpatory information that could change outcome of trial; although State's interest in protecting confidentiality of child abuse information is strong, this interest does not necessarily prevent disclosure in all cases.); see also Norton v. State, 137 N.E.3d 974, (Ind. Ct. App. 2019)

Hulett v. State, 552 N.E.2d 47 (Ind. Ct. App. 1990) (in child molesting prosecution, trial court erred in not conducting *in camera* inspection of victim's counselor's file and allowing D discovery of information relevant to preparation of defense).

Sturgill v. State, 497 N.E.2d 1070 (Ind. Ct. App. 1986) (trial court abused discretion in denying D's request for pretrial discovery of statements made by stepdaughter to welfare

[49] Ind. Code § 31-33-18-2(9).

dept.; statute prohibiting D's access to information gathered by welfare dept. during investigation of child molestations was unconstitutional as applied to facts of his case; trial court should have conducted *in camera* inspection of victim's statements to determine whether they benefitted defense.)

Pilarski v. State, 635 N.E.2d 166 (Ind. Ct. App. 1994) (no error in denying D access to welfare dept. reports he wanted to view with eye toward impeaching witness because trial court conducted proper *in camera* review of reports under I.C. § 31-6-11-18(a)(8) and found no exculpatory information).

In re Crisis Connection, Inc., 949 N.E.2d 789 (Ind. 2011) (defendant had no constitutional right to *in camera* review of records of a nongovernmental counseling agency where the General Assembly shielded the records from discovery; State's compelling interest in maintaining confidentiality of information gathered in course of serving emotional and psychological needs of victims of sexual abuse were not outweighed by D's right to present complete defense; neither Due Process Clause nor Sixth Amendment required disclosure of information protected by victim advocate privilege in this case. The three-step test for determining discoverability of records set forth in State v. Cline, 693 N.E.2d 1, 6 (Ind. 1998), does not apply to privileged information).

Friend v. State, 134 N.E.3d 441 (Ind. Ct. App. 2019) (2-1 majority affirmed denial of motions for preliminary discovery/*in camera* review of privileged counseling records which may have contained information that C.W. had been diagnosed with reactive attachment disorder, and consequently, could have been lying about the molestation allegations).

C. Privileged Communications

The counselor/client privilege does not include communications with unlicensed counselors including unlicensed social workers.[50]

D. Depositions

Refusing to allow a defendant to attend the deposition of an alleged victim of child molesting does not violate the right of confrontation guaranteed under the Indiana Constitution.[51] Ind. Code § 35-40-5-11.5, enacted in 2020, specifies that a child victim has the right to confer with a representative of the prosecuting attorney's office before being deposed. The new statute provides that a defendant may only depose a child victim if the prosecuting attorney agrees to the deposition or if a court authorizes the deposition. The statute also establishes a procedure for a court to use to determine whether to authorize the deposition of a child victim. First, the statute requires that the defendant contact the prosecuting attorney before contacting the child. I.C. § 35-40-5-11.5(d). Then, the prosecuting attorney may impose conditions on taking the deposition or may refuse to agree to the deposition. At that point, the defendant is

[50] Rogers v. State, 60 N.E.3d 256 (Ind. Ct. App. 2016).

[51] Jones v. State, 445 N.E.2d 98, 100 (Ind. 1983) and State v. McKinney, 82 N.E.3d 290 (Ind. Ct. App. 2017).

permitted to petition the court for authorization to depose, which requires a hearing "to determine whether to authorize a deposition, and whether to limit the manner in which the deposition shall be conducted." I.C. § 35-40-5-11.5(e). The court may only authorize a deposition if the child will be unavailable for trial, or where the "defendant establishes by a preponderance of the evidence that the deposition is necessary: (1) due to the existence of extraordinary circumstances; and (2) in the interest of justice." I.C. § 35-40-5-11.5(d)(3), (f), (g).

Church v. State, 189 N.E.3d 580 (Ind. 2022) (holding IC 35-40-5-11.5(e) does not impermissibly conflict with Trial Rule 26 because statute's predominant purpose is creating a substantive right for this class of victims and limiting substantive rights of defendants).

E. Miscellaneous

Seal v. State, 38 N.E.3d 717 (Ind. Ct. App. 2015) (State's failure to preserve audio recordings of interviews with two victims of child molesting did not deny D's right to due process; officers made written summaries of interviews, did not act in bad faith and D failed to show contents of interviews were materially exculpatory).

Matter of G.W., 977 N.E.2d 381 (Ind. Ct. App. 2012) (trial court may order a parent to make his or her child available for an interview requested by DCS to assess that child's "condition," where child's sibling has made and then recanted allegations of sexual abuse against family member who lives in the children's home; DCS's "assessment [into a report of child abuse], to the extent reasonably possible, must include the following: . . . (3) The names and conditions of other children in the home." I.C. § 31-33-8-7(a); if a custodial parent of a child refuses to allow DCS to interview the child after the caseworker has attempted to obtain the consent of the custodial parent to interview the child, subsection (d) allows DCS to petition trial court to order the custodial parent to make the child available to be interviewed by the caseworker).

Hall v. State, 36 N.E.3d 459 (Ind. 2015) (trial court erroneously denied D's Motion to Compel C.W.'s mother to answer question during deposition regarding possible prior false accusation child made in Kentucky; Court split 3-2 on whether error harmless beyond a reasonable doubt).

VII. EVIDENTIARY ISSUES

A. Relevancy; Character and 404(b) Evidence

Camm v. State, 908 N.E.2d 215 (Ind. 2009) ("it is axiomatic that the State cannot bootstrap evidence into admissibility by putting it in, forcing a denial, and then claiming that it was put in issue by the defendant"; here, trial court abused its discretion by admitting evidence from which State speculated D molested his daughter as motive for murder).

1. Sexually Explicit Paraphernalia and Pornography

Rafferty v. State, 610 N.E.2d 880 (Ind. Ct. App. 1993) (in trial for child molesting it was reversible error to admit various exhibits and testimony relating to sexually explicit paraphernalia because materials were not shown to have been used in crime and therefore were irrelevant.)

Buchanan v. State, 767 N.E.2d 967 (Ind. 2002) (pornographic pictures and drawings found in D's possession depicting naked and semi-clothed little girls not tied to D's relationship with C.W. were improperly admitted to prove D's character, even though C.W. told examining physician that an older man had taken pictures of her while she was naked and had licked her private area).

2. **Delay in Reporting**

Baumholser v. State, 62 N.E.3d 411 (Ind. Ct. App. 2016) (C.W.'s testimony she did not initially report molestation because D "drank a lot and had weapons in the house" was not impermissible character evidence under Evidence Rule 404 to show D was "drunken, armed menace," who, in molesting C.W., acted in accord with his bad character, but was simply C.W.'s explanation for why she waited four years to tell her mother that D molested her).

3. **Evid. R. 404(b)**

Mise v. State, 142 N.E.3d 1079 (Ind. Ct. App. 2020) (evidence of sex offenses occurring within charged time frame was "direct evidence" of charged crimes, not uncharged 404(B) evidence).

4. **Intent Exception to Evid. R. 404(b)**

Craun v. State, 762 N.E.2d 230 (Ind. Ct. App. 2002) (D did not affirmatively present claim of contrary intent by stating that he tickled C.W.'s upper thigh, since he never stated that he touched her vagina either accidentally or unintentionally; D's alleged inappropriate touching of other girls did not make it more or less probable that he touched C.W. with the intent to arouse or satisfy; even if the evidence would have been relevant, it would be inadmissible under Rule 403). See also Stettler v. State, 70 N.E.3d 874 (Ind. Ct. App. 2017).

Fisher v. State, 641 N.E.2d 105 (Ind. Ct. App. 1994) (although D placed his intent "at issue" by claiming any improper touching he might have done was unintentional and accidental, evidence of prior molest occurring 23 years before charged offenses was too remote to be genuinely relevant, and offenses were not sufficiently similar to make up for the remoteness in time, despite the fact that both victims were the same age and were allegedly molested in family home and in D's truck).

Hicks v. State, 690 N.E.2d 215, 222 (Ind. 1997) (intent exception to Evidence Rule 404(b) is available if defendant goes beyond merely denying charged culpability and affirmatively presents claim of particular contrary intent, whether in opening statement, by cross examination of State's witnesses, or by presentation of his own case in chief). See also Baker v. State, 997 N.E.2d 67, 72 (Ind. Ct. App. 2013) (D's denial that he participated in the crime does not place intent at issue).

5. **"Plan" Exception; Grooming**

Piercefield v. State, 877 N.E.2d 1213 (Ind. Ct. App. 2007) (evidence of victims' past massages of D's feet, back and buttocks was relevant to establishing preparation or plan in child

molestation; massages were either requested or demanded by D and, thus, admissible to show grooming of the victims).

Laird v. State, 103 N.E.3d 1171 (Ind. Ct. App. 2018) (D's internet search history from three days before the charged crime was admissible under "plan" exception because searches were both close in time and very similar to charged molest offenses against C.W.).

Cutshall v. State, 166 N.E.3d 373 (Ind. Ct. App. 2021) (pornography in internet search history was inadmissible because it was not similar enough to charged acts to be relevant).

Stettler v. State, 70 N.E.3d 874 (Ind. Ct. App. 2017) (testimony about prior alleged sexual conduct against C.W. inadmissible under plan exception because acts were not part of uninterrupted transaction and there was no dispute about identity of perpetrator).

Marshall v. State, 893 N.E.2d 1170 (Ind. Ct. App. 2008) (evidence of prior uncharged acts of molestation against one of C.W.s was intrinsic to time periods outlined in charging information and therefore outside of Evid. Rule 404(b)).

Guffey v. State, 42 N.E.3d 152 (Ind. Ct. App. 2015) (jail telephone calls were relevant to conspiracy to commit child molesting charge and showed defendant's preparation and grooming of co-conspirator and her son to prime them for a sexual act).

Remy v. State, 17 N.E.3d 396 (Ind. Ct. App. 2014) (finding harmless error to admit pornographic pictures found in D's residence but cautioning against overuse of "plan" and "grooming" rationales for admitting evidence normally inadmissible under Rule 404(b). "We must take care to ensure that Rule 404(b)'s exceptions do not swallow the rule.").

Greenboam v. State, 766 N.E.2d 1247 (Ind. Ct. App. 2002) (evidence of D's prior molestations of C.W. was not admissible to establish a "plan" under Rule 404(b); State established no similarity between acts except that they had occurred in family residence, which is too broad to be contemplated by Rule 404(b)). Cf. Southern v. State, 878 N.E.2d 315 (Ind. Ct. App. 2007) (subsequent sexual intercourse with victim was admissible to prove plan where in each instance D lured victim to secluded and remote place for sex).

Ware v. State, 816 N.E.2d 1167 (Ind. Ct. App. 2004) (prejudicial effect of sexual acts between D and victim that occurred outside jurisdiction outweighed probative value in prosecution for sexual misconduct with minor; although it had some relevance to State's theory that D was "grooming" victim by regaling him with vacations and other luxuries, evidence appeared only to be relevant to show propensity to commit sexual misconduct with minor).

B. Right to Present a Defense; Rape Shield Rule

Indiana's Rape Shield Rule bars evidence offered to prove that a victim or witness engaged in other sexual behavior. But Rule 412 does not render inadmissible evidence of specific instances of the alleged victim's or witness's sexual behavior if exclusion would violate the defendant's

constitutional right to confrontation or due process right to present a defense.[52] Another exception to the Rule allows a defendant to offer evidence of prior false accusations to impeach the complaining witness's credibility. The prosecutor may also open the door to evidence about the complaining witness otherwise barred by the Rape Shield Rule.[53]

The Rape Shield Act cannot be used to bar evidence that the victim had been molested prior to meeting the Defendant or prior to the relevant instance, which violates the Defendant's Sixth Amendment confrontation right.[54]

1. Prior False Accusation of Sexual Misconduct

A demonstrably false prior accusation of sexual conduct is not sexual conduct subject to Rule 412.[55] Although no bright line rule can be established for determining whether a prior accusation is "demonstrably false," the standard is "more stringent than a credibility determination." Ind. Evidence Rule 608(b), which would otherwise prohibit evidence of specific acts of untruthfulness to impeach accusing witness's credibility, must yield to the defendant's Sixth Amendment right of confrontation and right to present a full defense.[56] Notice and hearing requirement of Ind. Evidence Rule 412 applies to common law Rape Shield Rule exception allowing evidence of prior false rape allegations; failure to file written notice at least 10 days prior to trial is fatal to an attempt to introduce evidence of prior false allegations.[57]

2. Victim's Sexual History

In order for a defendant to admit evidence of a young complaining witnesses' sexual past in order to show the complaining witness has prior knowledge of the nature of sex, the defendant must show that the prior sexual act occurred and the prior sexual act was sufficiently similar to the present sexual act to give the victim the knowledge to imagine the molestation charge.

> Oatts v. State, 899 N.E.2d 714 (Ind. Ct. App. 2009) (D failed to show that prior molestation or pornographic video were so similar to current allegation that it was admissible to show C.W.'s knowledge of the nature of sex).

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[52] Ind. Evid. Rule § 412(b)(1)(C). See also Olden v. Kentucky, 488 U.S. 227 (1988).

[53] Hall v. State, 36 N.E.3d 459, 471 (Ind. 2015).

[54] Saylor v. State, 559 N.E.2d 332 (Ind. Ct. App. 1990); Redding v. State, 844 N.E.2d 1067 (Ind. Ct. App. 2006); and Turney v. State, 759 N.E.2d 671, 676 (Ind. Ct. App. 2001).

[55] Fugett v. State, 812 N.E.2d 846 (Ind. Ct. App. 2004).

[56] State v. Walton, 715 N.E.2d 824, 827 (Ind. 1999).

[57] Graham v. State, 736 N.E.2d 822 (Ind. Ct. App. 2000); and Sallee v. State, 785 N.E.2d 645, 651 (Ind. Ct. App. 2003).

Zawacki v. State, 753 N.E.2d 100 (Ind. Ct. App. 2001) (evidence that C.W. requested permission from D and his wife to engage in sexual relationship with D's daughter and wrote D's daughter letters suggesting that they form sexual relationship was admissible in sexual misconduct trial as impeachment evidence showing C.W.'s bias, prejudice, or ulterior motive, where C.W. testified that she had not requested permission to engage in sexual relationship with D's daughter).

Davis v. State, 749 N.E.2d 552 (Ind. Ct. App. 2001) (erroneous exclusion of evidence of C.W.'s prior sexual conduct unfairly bolstered C.W.'s testimony, inasmuch as inference arises that, because C.W. was accurate in stating that sexual contact had occurred, as disclosed by physical examination, she also must have been accurate in stating that D was perpetrator of charged offenses; without permitting D to introduce exculpatory evidence, the only reasonable inference that jury could have drawn from evidence presented was that D was perpetrator and that C.W.'s accusations were true, because reasonable jurors would not think it typical that a twelve-year-old was sexually active).

> But see McVey v. State, 863 N.E.2d 434 (Ind. Ct. App. 2007) (unlike Davis, the challenged evidence does not show that possible other perpetrator molested C.W. at time of charged offense; thus, record lacked specific evidence required to support a reasonable inference that some person other than D had committed the charged act); and Oatts v. State, 899 N.E.2d 714 (Ind. Ct. App. 2009) (where, unlike in Steward and Davis, there is no evidence other than C.W.'s testimony that sexual contact occurred, evidence of prior molestation by a different person is excluded by rape shield rule).

Alvarado v. State, 89 N.E.3d 442 (Ind. Ct. App. 2017) (no error in excluding evidence that C.W. had been molested by her mother's new boyfriend after D molested her; while not rejecting "sexual innocence inference" theory, Court suggested that concerns about jury unduly inferring sexual innocence could be addressed in voir dire).

Watson v. State, 134 N.E.3d 1038 (Ind. Ct. App. 2019) (no error in excluding evidence of internet searches on pornographic sites because D failed to demonstrate that it was C.W. who performed the various internet searches; exclusion of this evidence did not violate D's fundamental right to cross-examine witnesses because there was no evidence that C.W. conducted the searches).

3. Other Defenses

Steward v. State, 636 N.E.2d 143 (Ind. Ct. App. 1994) (trial court erred in denying D right to present evidence that C.W. accused four others of molesting her around same time as she accused D, because evidence went to rebutting inference of his guilt from expert testimony that C.W.'s behavior was consistent with one who had been molested; D's Sixth Amendment right to confrontation was violated because he was denied full, adequate, and effective cross examination; rape shield rule cannot be applied "mechanistically to prohibit the defense from either offering its version of the facts or assuring through cross examination

that the trier of fact has a satisfactory basis for evaluating the truth of the witnesses' testimony."), *summarily aff'd*, 652 N.E.2d 490.

Hyser v. State, 996 N.E.2d 443 (Ind. Ct. App. 2013) (trial court improperly denied D meaningful opportunity to present complete defense in child molesting trial, i.e., that allegations and testimony against him were fabricated as retaliation for his report to DCS that he believed C.W. was being abused by C.W.'s mother's boyfriend).

DeMotte v. State, 555 N.E.2d 1336 (Ind. Ct. App. 1990) (trial court erred in excluding testimony regarding C.W.'s capacity to describe alleged molesting accurately. At trial, D was prohibited from questioning child's mother and stepmother about child's knowledge of sexual development and ability to describe sexual acts; trial court also prevented D from questioning investigating officer about child's ability to describe alleged molesting, and to question school administrator about child's emotional and other problems; whenever an alleged child molest victim takes the stand, capacity to accurately describe encounter with adult which may involve touching, sexual stimulation, displays of affection and the like, is automatically in issue.)

Strunk v. State, 44 N.E.3d 1 (Ind. Ct. App. 2015) (in sexual misconduct with a minor prosecution, trial court did not abuse its discretion in refusing to allow D to cross-examine C.W. about her marijuana usage the night of the molestation, in absence of evidence that smoking impaired her perception, ability to remember, or ability to testify about the molestation).

C. Right to Confrontation and Cross-examination

The Confrontation Clause of the Sixth Amendment requires that an unavailable witness' out of court statements may not be admitted against a defendant unless the defendant has the opportunity to confront and cross examine the witness. Testimonial statements of witnesses absent from trial are admissible only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross examine. Other "indicia of reliability" are not an adequate substitute for cross examination. The Confrontation Clause commands "that reliability be assessed in a particular manner: by testing in the crucible of cross examination." Thus, when prosecution seeks to introduce "testimonial" out of court statement into evidence against a defendant, the Confrontation Clause requires: (1) that witness who made statement is unavailable; and (2) that the defendant had a prior opportunity to cross examine witness.[58]

Coy v. Iowa, 487 U.S. 1012, 108 S.Ct. 2798 (1988) (Confrontation Clause guarantees D face to face meeting with witnesses appearing before trier of fact. Right to face to face confrontation serves to ensure integrity of the fact-finding process. Here, use of screen to prevent 13-year-old complaining witness from seeing D violated D's confrontation rights.).

[58] Crawford v. Washington, 124 S. Ct. 1354 (2004).

Lilly v. Virginia, 527 U.S. 116, 119 S.Ct. 1887 (1999) (evidence which would be admissible under the hearsay rules may still be inadmissible under the Confrontation Clause).

D.G.B. v. State, 833 N.E.2d 519 (Ind. Ct. App. 2005) (C.W.'s statements to mother and police officer at police station were inadmissible under Crawford).

Agilera v. State, 862 N.E.2d 298 (Ind. Ct. App. 2007) (C.W.'s out of court statements to her mother, grandmother, detective, and forensic interviewer were admissible under Indiana's Protected Person statute and Crawford).[59]

Purvis v. State, 829 N.E.2d 572 (Ind. Ct. App. 2006) (C.W.'s statements to police officer were testimonial, as primary purpose of questioning was to get information for prosecution. Further, although D had an opportunity to question the child during a hearing to determine the child's competency to testify, this did not constitute cross examination for Crawford purposes, because child was determined incompetent to testify and D lacked an opportunity for full, adequate, and effective cross examination. While not providing a precise test for adequate opportunity, a witness unable to appreciate the obligation to testify truthfully cannot be effectively cross examined for Crawford purposes. Court found admission of these statements at trial cumulative of other evidence and thus harmless error.).

Cross-examination should be limited to the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into other matters as if on direct examination.[60] Although regulation of cross-examination is within the discretion of the trial court, the defendant also is entitled to present his theory of defense.[61] In criminal cases, the right of confrontation limits the trial court's discretion. Indiana's constitutional right to confrontation is more extensive in some respects than that in the U.S. Constitution in that Article 1, Section 13 guarantees a criminal defendant the right to face-to-face confrontation with witnesses against him.[62]

McCarthy v. State, 749 N.E.2d 528 (Ind. 2001) (in child molesting prosecution, where D was teacher charged with molesting two students, it was error to deny D opportunity to cross examine C.W.'s mother about having filed a Notice of Tort Claim against school).

Hall v. State, 36 N.E.3d 459 (Ind. 2015) (trial court erroneously prohibited D from cross-examining C.W.'s mother on fact she told D about prior false accusation during a phone conversation; the State opened the door on direct by asking the mother about the phone

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[59] See also Anderson v. State, 833 N.E.2d 119 (Ind. Ct. App. 2005); and Ennik v. State, 40 N.E.3d 868 (Ind. Ct. App. 2015).

[60] Indiana Rule of Evidence 611(b).

[61] Thakkar v. State, 613 N.E.2d 453 (Ind. Ct. App. 1993), *disapproved on other grounds by* Sloan v. State, 947 N.E.2d 917 (Ind. 2011).

[62] Arndt v. State, 642 N.E.2d 224, 228 (Ind. 1994); Buzzard v. State, 712 N.E.2d 547 (Ind. Ct. App. 1999).

conversation to imply that D was baselessly searching for ways to undermine a 12-year-old's credibility).

Embry v. State, 923 N.E.2d 1 (Ind. Ct. App. 2010) (where the defense impeaches a State's witness by exposing her bias against D, the State may not offer evidence of prior misconduct committed by D against the witness solely to explain the witness's disposition; offering D's prior bad acts to explain a witness's animosity only reinforces--rather than disproves--the witness's disposition).

D. Lay testimony - vouching

Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions.[63] All vouching, whether direct or indirect, of a child witness is inadmissible under Ind. Rule of Evidence 704.[64] Thus, the adoption of Rule 704 *overruled* prior common law, such as Lawrence v. State, 464 N.E.2d 923 (Ind. 1984), that allowed testimony regarding whether kids are prone to exaggerate or fantasize.

Kindred v. State, 973 N.E.2d 1245 (Ind. Ct. App. 2012) (investigator's testimony that child was not coached, in addition to his repeated assertions in an interview played for the jury that the child was truthful and believable, constituted impermissible vouching and fundamental error); but see Sampson v. State, 38 N.E.3d 985 (Ind. 2015) (holding that testimony about whether child exhibited signs of coaching, or has or has not been coached, is permissible when defendant has opened door to such testimony)

Bradford v. State, 960 N.E.2d 871 (Ind. Ct. App. 2012) (DCS investigator's testimony that after investigation she substantiated sexual abuse, meaning "our office feels that there was enough evidence to conclude that sexual abuse occurred" constituted an inadmissible opinion as to the truth or falsity of the allegations and reversible error).

Bean v. State, 15 N.E.3d 12 (Ind. Ct. App. 2014) (DCS investigator's testimony that after conducting his investigation, he "draw[s] a conclusion [as] to my belief, did it happen, did it not happen, whatever the allegation may be," and he "drew the conclusion to substantiate the allegation, and it was upheld by our director and agreed with by the child[-]protection team" constituted impermissible vouching).

Heinzman v. State, 970 N.E.2d 214 (Ind. Ct. App. 2012) (DCS investigator's testimony that she substantiated allegations but also explaining that it means DCS simply has a "reason to believe" that the report of inappropriate touching "may have some factual foundation" and not that the allegations were "absolutely true" was not an inadmissible opinion as to the truth or falsity of the allegations), *overruled in part on other grounds* 980 N.E.2d 323 (Ind.).

[63] Ind. Rule of Evidence 704(b).

[64] Hoglund v. State, 962 N.E.2d 1230 (Ind. 2012).

Gutierrez v. State, 961 N.E.2d 1030 (Ind. Ct. App. 2012) (repeated statements from witnesses that they believed the child victim and the prosecutor's closing in which he expressed his opinion that he believed the child also constituted improper vouching and fundamental error).

Thompson v. State, 529 N.E.2d 877 (Ind. Ct. App. 1988) (permitting a nonexpert witness to express an opinion that the child victim, his daughter, was telling the truth was reversible error, where the testimony was not cured by an immediate admonition).

Wilkes v. State, 7 N.E.3d 402 (Ind. Ct. App. 2014) (detective's statements that C.W.'s reports were "consistent" and there is no reason why he would make up something like this were impermissible vouching; harmless error).

E. Expert testimony - vouching

The subtle distinction between an expert's testimony that a child has or has not been coached versus an expert's testimony that the child did or did not exhibit any signs or indicators of coaching is insufficient to guard against the dangers that such testimony will constitute impermissible vouching. Thus, testimony about the signs of coaching and whether a child exhibited such signs or has or has not been coached is admissible only if the defendant opens the door to such testimony.[65]

Norris v. State, 53 N.E.3d 512 (Ind. Ct. App. 2016) (testimony of forensic interviewer about the indicia of a child's reliability and whether she observed that indicia in the complaining witness constituted improper vouching as to whether the child fit "the behavioral profile," when D did nothing to open the door to the testimony; harmless error).

Baumholser v. State, 62 N.E.3d 411 (Ind. Ct. App. 2016) (expert witness's opinion that delayed reporting was common in child sexual abuse cases did not improperly vouch for the credibility of the victim or express an opinion on defendant's guilt).

Carter v. State, 31 N.E.3d 17 (Ind. Ct. App. 2015) (interviewer's testimony concerning dynamics of child abuse, the disclosure process and when and why a child may recant his disclosures of abuse did not constitute improper vouching testimony; She made no mention of C.W. in her testimony, nor did she make any statement or opinion regarding the truth or falsity of C.W.'s allegations of molestation).

Alvarez-Madrigal v. State, 71 N.E.3d 887 (Ind. Ct. App. 2017) (pediatrician's testimony that less than two to three children out of 1,000 make up claims of sexual abuse did not constitute impermissible vouching testimony).

F. Expert testimony – child sexual abuse syndrome

In prosecutions for child molesting, child sexual abuse syndrome, profile, or pattern evidence is not admissible to prove that child abuse occurred. However, if defense calls child's credibility

[65] Sampson v. State, 38 N.E.3d 985 (Ind. 2015) and Hamilton v. State, 43 N.E.3d 628 (Ind. Ct. App. 2015).

into question or presents evidence that child's post abuse behavior was inconsistent with claim of abuse, use of proper expert testimony may be appropriate if evidence assists fact-finder in understanding child's responses to abuse, and requirements of both Ind. Evidence Rule 702(b) and Rule 403 balancing test are satisfied.[66]

Fleener v. State, 656 N.E.2d 1140 (Ind. 1995) (trial court erred in admitting expert testimony regarding child sexual abuse syndrome evidence, where there was no foundational showing of reliability under Ind. Evidence Rule 702(b)).

Lyons v. State, 976 N.E.2d 137 (Ind. Ct. App. 2012) (admission of child psychologist's testimony was not fundamental error where it was not offered to prove (even by implication or inference) that C.W. had been molested; instead State properly offered the witness's testimony because D repeatedly attacked C.W.'s credibility with alleged inconsistencies in statements regarding the abuse and a changing time pattern in the accusations; the doctor's testimony showed the jury that inconsistencies in a sexual abuse victim's testimony were not atypical).

Head v. State, 519 N.E.2d 151 (Ind. 1988) (Trial court erred in allowing expert witness to testify as to credibility of child victim witness. Expert properly testified about psychological makeup of child victim witness, and offered opinion that child was not prone to fantasy or fabrication. Over D's objection, prosecutor and expert examined each portion of child's testimony in detail, and expert stated that in each instance child was telling truth. Notwithstanding special problems in assessing credibility of child victim witnesses in child molest cases, expert in this case invaded province of jury.)

Turner v. State, 720 N.E.2d 440 (Ind. Ct. App. 1999) (nurse who was trained to examine children for abuse in emergency room was qualified to testify that victim's injuries were indicative of child molest).

Pedrick v. State, 593 N.E.2d 1213 (Ind. Ct. App. 1992) (trial court did not abuse its discretion in refusing to allow expert testimony concerning the children's perceptions of the touchings since D did not dispute touching the children; instead the sole issue before the jury was whether touchings were motivated by the necessary specific intent to arouse or satisfy D's sexual desires, and expert testimony would not aid the jury in its determination of intent).

Farmer v. State, 908 N.E.2d 1192 (Ind. Ct. App. 2009) (neither counsel nor trial court should refer to witnesses as "experts" in front of the jury).

G. Protected Person Statute

Before a child's videotaped statement is admissible in lieu of live testimony, the Protected Person Statute requires a trial court to conduct a hearing where the C.W. must either testify in

[66] Steward v. State, 652 N.E.2d 490 (Ind. 1995).

person or via closed circuit television. The hearing lets a court assess the C.W.'s competency and credibility, and the circumstances surrounding the statement to ensure its reliability. Under Ind. Code § 35-37-4-6(e)(2), a determination that a child witness is unavailable may be predicated only upon a trial court finding: (1) from testimony of a psychiatrist, physician, or psychologist and other evidence, if any, that the child will suffer emotional distress such that she cannot reasonably communicate if testifying in physical presence of the defendant; (2) the child cannot participate at trial for medical reasons; or (3) the child is legally incompetent to testify.

Considerations in making the reliability determination under the statute include: (1) the time and circumstances of the statement, (2) whether there was significant opportunity for coaching, the nature of the questioning, (3) whether there was a motive to fabricate, (4) use of age appropriate terminology, and (5) spontaneity and repetition.[67]

It is inappropriate to admit child hearsay into evidence when the child in question is competent and able to testify at trial without causing trauma. The admission of consistent testimony is cumulative, unfairly prejudicial and often unnecessary.[68]

> Howard v. State, 853 N.E.2d 461 (Ind. 2006) (because there was no showing that C.W. was unavailable for trial within the meaning of Protected Person statute, trial court erred in allowing deposition of C.W. into evidence. Here, C.W. became emotional and was unable to testify at trial. Although both parties and trial court tried to encourage C.W. to testify, there was no testimony from psychiatrist, physician or psychologist about the child suffering emotional harm. Because child was not properly found unavailable, it was error to admit into evidence her pretrial discovery deposition. However, D had full, fair and adequate opportunity to confront and cross examine C.W., within meaning of Sixth Amendment, because her pretrial deposition was taken under oath for discovery purposes).
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> Rosenbaum v. State, 193 N.E.3d 417 (Ind. Ct. App. 2022) (rejecting State's argument that recorded interview was admissible because it and trial testimony were not "consistent").

In order for a court to conclude that a child witness is unavailable as a witness, it requires that the conclusion be made upon the testimony of a psychiatrist, physician, or psychologist, and any other evidence, if any.[69]

> Pierce v. State, 677 N.E.2d 39 (Ind. 1997) (Hearsay testimony recounting three-year-old C.W.'s statements to her mother and police officers, as well as subsequent videotaped interview, exhibited sufficient indications of reliability as required by Indiana's "protected person" statute, Ind. Code § 35-37-4-6. Statute does not require trial court affirmatively to offer D opportunity to cross examine C.W. after finding her to be incompetent; statute

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[67] Pierce v. State, 677 N.E.2d 39, 44 (Ind. 1997).

[68] Tyler v. State, 903 N.E.2d 463 (Ind. 2009); Cox v. State, 937 N.E.2d 874 (Ind. Ct. App. 2010).

[69] Ind. Code § 35-37-4-6; Taylor v. State, 735 N.E.2d 308 (Ind. Ct. App. 2000); and Norris v. State, 53 N.E.3d 512 (Ind. Ct. App. 2016).

requires that C.W. be available for cross examination at admissibility hearing, if separate hearings are conducted, or combined hearing if that procedure is followed. Here, D was not denied right to face to face confrontation under Ind. Const., Article 1, Sec. 13.).

Carpenter v. State, 786 N.E.2d 696 (Ind. 2003) (In child molesting prosecution, hearsay testimony recounting three-year-old C.W.'s statements to her mother and grandfather, and her subsequent videotaped interview failed to exhibit sufficient indicia of reliability to be presented to jury under Indiana's protected person statute, Ind. Code § 35-37-4-6. Thus, trial court erred in admitting C.W.'s out of court statements at trial. Hearsay testimony was unreliable because there was no indication that C.W.'s statements were made close in time to alleged molestations, statements themselves were not sufficiently close in time to each other to prevent implantation or cleansing, and during competency hearing, C.W. was unable to distinguish between truth and falsehood.).

> Cf. Trujillo v. State, 806 N.E.2d 317 (Ind. Ct. App. 2004) (trial court did not abuse its discretion in concluding that four year old C.W.'s statements to her mother had sufficient indications of reliability under Indiana's protected person statute, I.C. 35 37 4 6, as well as determining that subsequent videotaped interview with detective was admissible; distinguishing Carpenter, court noted that it was clear that alleged incident in this case occurred several hours before C.W. made statements to her mother).

Nunley v. State, 916 N.E.2d 712 (Ind. Ct. App. 2009) (trial court abused its discretion by admitting child victim's hearsay statement via videotape of her interview which occurred a year after alleged molestation and initial disclosure).

D.G.B. v. State, 833 N.E.2d 519 (Ind. Ct. App. 2005) (in child molesting prosecution, D did not have an opportunity to cross examine C.W. under Protected Person Statute, where C.W. would not take oath, turned away from judge and put hands over ears during questioning).

L.H. v. State, 878 N.E.2d 425 (Ind. Ct. App. 2007) (juvenile court erred in incorporating all testimony, evidence, and exhibits from child hearsay hearing into fact-finding hearing; I.C. 35-37-4-6(e) contemplates a dual proceeding).

Broude v. State, 956 N.E.2d 130 (Ind. Ct. App. 2011) (In child molesting prosecution, trial court did not abuse its discretion in allowing victim to testify via closed circuit television, even though State did not notify D at least ten days before trial that the victim would so testify, as required by Protected Person Statute. D failed to show that he was prejudiced by lack of timely notice, even though he claimed that if he had known that the victim would testify via closed circuit television, he might have accepted a plea offer).

A.R.M. v. State, 968 N.E.2d 820 (Ind. Ct. App. 2012) (video-taped interview regarding alleged child molestation admissible under PPS where C.W. also testified live at trial but could not recall the incident; fact that C.W.'s statement was not spontaneous alone does not make statement inadmissible).

H. Hearsay Exceptions

Prosecutor cannot use "course of investigation" to get around hearsay objections; while jurors may be curious about why investigators acted, an explanation of their actions may have no probative value.[70]

1. Statements Made for Medical Diagnosis or Treatment

While a declarant's motivation to seek treatment and provide truthful information may be inferred from the circumstances, the inference may be less apparent when the declarant is a child because children may not understand the importance of giving truthful responses in order to assure accurate medical diagnosis and treatment.[71] In such circumstances, there must be evidence that the declarant understood the professional's role in order to trigger the motivation to provide truthful information.[72] Thus, a foundational testimony from the medical professional detailing the interactions between them and the declarant, how they explained their role, and an affirmation that the declarant understood their role.[73]

2. Then Existing Mental, Emotional, or Physical Condition

While a person is allowed to testify as to statements victim made in reference to pain they are experiencing pursuant to Ind. Evidence Rule § 803(3), they are not allowed to make further statements that include a narrative of the manner in which the injuries were received or pain inflicted.[74]

3. Excited Utterance

D.G.B. v. State, 833 N.E.2d 519 (Ind. Ct. App. 2005) (despite fact C.W. had undergone surgery and put under anesthesia, Ct. determined the statement to her mother was still under the stress of excitement caused by earlier molestation, thus admissible under excited utterance hearsay exception, Ind. Evidence Rule § 803(2)).

4. Recorded Recollection

Gorby v. State, 152 N.E.3d 649 (Ind. Ct. App. 2020) (no abuse of discretion in admitting video of forensic interview under recorded recollection exception to hearsay rule, where trial court concluded that C.W. could not remember the events).

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[70] Kindred v. State, 973 N.E.2d 1245 (Ind. Ct. App. 2012).

[71] McClain v. State, 675 N.E.2d 329, 331 (Ind. 1996).

[72] Id.

[73] See McClain v. State, 675 N.E.2d 329, 331 (Ind. 1996); VanPatten v. State, 986 N.E.2d 255 (Ind. 2013); and Burton v. State, 23 N.E.3d 49 (Ind. Ct. App. 2014).

[74] Simmons v. State, 746 N.E.2d 81 (Ind. Ct. App. 2001) and Camm v. State, 908 N.E.2d 215 (Ind. 2009).

Housand v. State, 162 N.E.3d 508 (Ind. Ct. App. 2020) (trial court erred in admitting video of forensic interview under recorded recollection exception when C.W. gave testimony addressing all elements of charges and jury had sufficient info. upon which to deliberate).

5. Business Records

Sandleben v. State, 22 N.E.3d 782 (Ind. Ct. App. 2014) (in public voyeurism prosecution, trial court abused its discretion by admitting internet service provider's records, because State did not lay adequate foundation for their admission under business records exception to hearsay rule. Although a sponsor need not be custodian or creator of proffered record, sponsor must still testify about how the record was made, who filed it, and that person who filed it was both authorized to do so and had personal knowledge of the transaction).

I. C.W.'s competency to testify

At a minimum, the alleged victim should be able to articulate that they understand the difference between a truth and a lie and the importance of telling the truth.[75]

Harrington v. State, 755 N.E.2d 1176 (Ind. Ct. App. 2001) (fact that child's testimony at trial could be interpreted as ambiguous goes to child's credibility, not his competency).

J. Miscellaneous Evidentiary Issues

Burton v. State, 23 N.E.3d 49 (Ind. Ct. App. 2014) (D's selected use of the deposition to impeach child C.W.'s trial testimony opened the door to admission of the entire deposition to correct potentially misleading impressions created by D pursuant to doctrine of completeness) (reclassified as for-publication on Dec. 2, 2014).

Gonzalez v. State, 929 N.E.2d 699 (Ind. 2010) (trial court erred in admitting D's apology letter at trial; D wrote letter while victim considered whether to object to plea agreement, which trial court eventually rejected).

King v. State, 908 N.E.2d 673 (Ind. Ct. App. 2009) (where Yahoo! failed to verify accuracy of the source of information in its user profile and login tracker for the account from which an undercover agent posing as a fifteen-year-old girl was solicited, the source of information of the method or circumstances of preparation of the user profile and login tracker indicated a lack of trustworthiness and were inadmissible; nonetheless, error was harmless), *summarily aff'd in relevant part by* 921 N.E.2d 1288 (Ind. 2010).

Gaby v. State, 949 N.E.2d 870 (Ind. Ct. App. 2012) (Trial court abused its direction by permitting State to allow C.W. to read the transcript of her previous statement when the witness had not testified that she could not recall the information sought by the prosecutor. Although Evidence Rule 612(a) clearly envisions the use of writings to refresh a witness's memory, it does not

[75] Newsome v. State, 686 N.E.2d 868 (Ind. Ct. App. 1997) and Howard v. State, 816 N.E.2d 948 (Ind. Ct. App. 2004).

address the method by which the witness's memory may be refreshed. Regardless, the witness must first state that he does not recall the information sought by the questioner).

Seal v. State, 105 N.E.3d 201 (Ind. Ct. App. 2018) (independent evidence of penetration unnecessary for admission of confession to support level 1 felony child molesting conviction; corpus delicti rule does not require the State to make out a prima facie case as to each element of the offense charged). See also J.C. v. State, 140 N.E.3d 865 (Ind. Ct. App. 2019).

VIII. PROSECUTORIAL MISCONDUCT

Errors during closing argument coupled with other misconduct during the trial may also result in relief on appeal.[76] Defense arguments may open the door to otherwise improper closing arguments from the prosecutor to which you may not have a valid objection.[77] When objecting to prosecutorial misconduct, ask the judge to instruct jurors to disregard the comment, even if objections were *overruled*. If not satisfied with the admonishment, move for a mistrial. Failure to do this results in waiver of the issue.[78]

Bannowski v. State, 677 N.E.2d 1032 (Ind. 1997) (during voir dire, State questioned prospective jurors regarding whether they would expect to hear testimony from care-givers, counselors, and teachers of alleged victim and whether they would find that evidence to be helpful before advising the prospective jurors that such evidence was inadmissible; court held that the State's questions improperly inferred that the victim had repeated the story of the crime to number of responsible care-providers and further that such witnesses could have verified her believability were they able to testify; failure of D's attorney to object did not constitute ineffective assistance of counsel as there were various proper reasons why attorney may have chosen to avoid objecting to State's improper voir dire questions).

1. Improper Vouching for State's Witnesses

A prosecutor cannot attempt to bolster the credibility of their witness's by conveying to the jury their personal belief that the witnesses were speaking the truth.[79] Prosecutors are not allowed to assert their own personal knowledge of the facts at issue.[80] Further, prosecutors may not convey messages such as it is their job to "seek justice" and negatively imply that

[76] Gaby v. State, 949 N.E.2d 870 (Ind. Ct. App. 2011) and Brummett v. State, 10 N.E.3d 78 (Ind. Ct. App. 2013).

[77] Ryan v. State, 9 N.E.3d 663 (Ind. 2014).

[78] Dumas v. State, 803 N.E.2d 1113, 1117 (Ind. 2004). But see Williams v. State, 29 N.E.3d 144 (Ind. Ct. App. 2015) (noting that "[i]t makes absolutely no sense" to require a defendant to "request an admonishment or a mistrial after having been told by the trial court that no misconduct occurred").

[79] Brummett v. State, 10 N.E.3d 78 (Ind. Ct. App. 2013).

[80] Gaby v. State, 949 N.E.2d 870 (Ind. Ct. App. 2011).

the defense counsel's job was something else, in an attempt to bolster the credibility of the State's witnesses.[81]

Stettler v. State, 70 N.E.3d 874 (Ind. Ct. App. 2017) (State was not attempting to vouch for C.W.'s truthfulness when it asked jury to consider whether it appeared easy for C.W. to testify. Because C.W. cried several times during her testimony, and at least once suffered what appeared to be a panic attack, prosecutor's statements about C.W.'s difficulties in testifying "were at most restatements to the jury of what they had already seen during the trial").

2. Improper Comments

Surber v. State, 884 N.E.2d 856 (Ind. Ct. App. 2008) (given evidence presented and D's arguments at trial, prosecutor did not commit misconduct by arguing that C.W. was telling the truth and D was lying; as for prosecutor's comments regarding detective and investigator knowing what they were doing and sending C.W. back to D, these comments "at least approached if not crossed the line of improper commentary," but did not constitute fundamental error).

Feyka v. State, 972 N.E.2d 387 (Ind. Ct. App. 2012) (prosecutor's improper comments were not fundamental error because D vigorously cross-examined the witnesses, including C.W.; jury could have considered the prosecutor's comments as commentary on the nature of the evidence presented, which is permitted).

Owens v. State, 937 N.E. 2d 880 (Ind. Ct. App. 2010) (prosecutor's single, vague statement that "other than the D, [C.W.] is the only one who knows what happened" did not constitute fundamental error).

3. Asking Jury to Convict for Reasons Other than Guilt

Ryan v. State, 9 N.E.3d 663 (Ind. 2014) (in sexual misconduct with a minor case, prosecutor's request for jury to look at "bigger picture" and telling them that they are in "an incredible position to stop" this type of behavior and "send the message that we're not going to allow people to do this" clearly invited jury to convict for reasons other than guilt and constituted improper conduct; however, misconduct did not constitute fundamental error).

4. Arguing Appellate Standard of Review in Closing Argument

Vasquez v. State, 174 N.E.3d 623 (Ind. Ct. App. 2021) (prosecutor's argument that "uncorroborated testimony of the child victim, is sufficient to support a conviction of child molesting" was improper under Ludy v. State, 784 N.E.2d 459 (Ind. 2003), but Court declined to find it constituted reversible error under the circumstances).

[81] Sanders v. State, 724 N.E.2d 1127 (Ind. Ct. App. 2000).

IX. JURY INSTRUCTIONS

A. Trial Court/State's Instructions

Gale v. State, 882 N.E.2d 808 (Ind. Ct. App. 2008) (despite alleged error in pattern instruction re: elements of rape, in that it failed to instruct jury that D had to have sexual intercourse with C.W. knowing that she was unaware that he was doing so, Court found no fundamental error because there was substantial evidence presented at trial that C.W. was unaware that sexual intercourse was occurring and that D was aware of her condition).

1. Improper Instructions

"A conviction may be based solely on the uncorroborated testimony of the alleged victim if such testimony establishes each element of any crime charged beyond a reasonable doubt"[82]

Failure to include mens rea element.[83]

Instruction alleviating the State's burden to prove date of child molesting offense when offense occurred in 2014, the year of the criminal code overhaul.[84]

2. Proper Instructions

Defendant can be convicted under Ind. Code § 35-42-4-3(b) for "knowingly or intentionally" fondling or touching a child with the intent to arouse or gratify himself or the child.[85]

"[A]ny sexual penetration, however slight, may be sufficient to complete the crime of child molestation."[86]

Because age-based exception to sexual misconduct with a minor is not in section of statute defining the offense, but in a subsequent section, the exception is an affirmative defense, not a material element of the crime. Thus it is proper to instruct the jury that the Defendant carries the burden to prove by a preponderance of the evidence that the defendant reasonably believed that the victim was at least 16 years old.[87]

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[82] Ludy v. State, 784 N.E.2d 459 (Ind. 2003) and Bayes v. State, 791 N.E.2d 263 (Ind. Ct. App. 2003).

[83] Medina v. State, 828 N.E.2d 427 (Ind. Ct. App. 2005).

[84] Keister v. State, 203 N.E.3d 548 (Ind. Ct. App. 2023).

[85] Loallen v. State, 778 N.E.2d 794 (Ind. 2002).

[86] Surber v. State, 884 N.E.2d 856 (Ind. Ct. App. 2008) and Ives v. State, 418 N.E.2d 220 (Ind. 1981).

[87] Wilson v. State, 997 N.E.2d 38 (Ind. Ct. App. 2013); T.M. v. State, 804 N.E.2d 773 (Ind. Ct. App. 2004); Neblett v. State, 396 N.E.2d 930 (Ind. Ct. App. 1979); Lechner v. State, 715 N.E.2d 1285 (Ind. Ct. App. 1999); and Moon v. State, 823 N.E.2d 710 (Ind. Ct. App. 2005).

B. Defense Instructions

Because sexual battery is neither inherently nor factually included in class C felony child molesting as charged, trial court did not err in failing to instruct jury on class D felony sexual battery.[88]

But see Pedrick v. State, 593 N.E.2d 1213 (Ind. Ct. App. 1992) (Trial court erroneously denied instruction on battery as lesser included offense of child molesting where charging information did not preclude battery conviction, and there was serious evidentiary dispute as to element distinguishing two offenses. After this decision, in Wright v. State, 658 N.E.2d 563 (Ind. 1995), the Indiana Supreme Court set forth three-step analysis that trial courts should use when called upon by either party to give jury instruction on lesser included offense of crime charged).

Because age-based exception to sexual misconduct with a minor is not in section of statute defining the offense, but in a subsequent section, the exception is an affirmative defense, not a material element of the crime. Thus, it is proper to instruct the jury that the Defendant carries the burden to prove by a preponderance of the evidence that the defendant reasonably believed that the victim was at least 16 years old.[89]

X. VERDICT/JUDGMENT

Indiana has long required that a verdict of guilty in criminal cases must be unanimous. But applying the rule of jury unanimity can be difficult in child sex offense cases. There can be no joinder of separate and distinct offenses in one and the same count, but the State may allege alternative means or theories of culpability when prosecuting the D for a single offense. Thus, a disjunctive instruction, which allows jury to find a D guilty if he commits either of two or more underlying acts, either of which is in itself a separate offense, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the D committed one particular offense. In cases where evidence is presented of a greater number of separate criminal offenses than the defendant is charged with, the State may in its discretion designate a specific act (or acts) on which it relies to prove a particular charge. However, if the State decides not to so designate, then jurors should be instructed that in order to convict the defendant they must either unanimously agree that the D committed the same act or acts or that D committed all of the acts described by the victim and included within the time period charged. Further, if the defendant does not object to a jury unanimity instruction, the issue is waived.[90]

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[88] Walker v. State, 988 N.E.2d 341 (Ind. Ct. App. 2013).

[89] Wilson v. State, 997 N.E.2d 38 (Ind. Ct. App. 2013); T.M. v. State, 804 N.E.2d 773 (Ind. Ct. App. 2004); Neblett v. State, 396 N.E.2d 930 (Ind. Ct. App. 1979); Lechner v. State, 715 N.E.2d 1285 (Ind. Ct. App. 1999); and Moon v. State, 823 N.E.2d 710 (Ind. Ct. App. 2005).

[90] Baker v. State, 948 N.E.2d 1169 (Ind. 2011) and Benson v. State, 73 N.E.3d 198 (Ind. Ct. App. 2017).

XI. SENTENCING

A. Aggravators/Mitigators

Where a trial court's reason for imposing a sentence greater than the advisory sentence includes material elements of the offense, absent something unique about the circumstances that would justify deviating from the advisory sentence, that reason is "improper as a matter of law."[91]

Asher v. State, 790 N.E.2d 567 (Ind. Ct. App. 2003) (trial court improperly considered D's position of trust with the victim, which is an element of the offense of child seduction, as an aggravating circumstance).

Hart v. State, 829 N.E.2d 541 (Ind. Ct. App. 2005) (trial court improperly used fact that defendant disseminated photos of his four-year-old child over internet to enhance child exploitation counts, as this consideration is part of criminal conduct).

Davis v. State, 796 N.E.2d 798 (Ind. Ct. App. 2003) (because element of crime may not also be used to enhance sentence without particularized circumstances of case, and trial court here gave no particularized circumstances, fact that victim was less than twelve years old, normally a statutory aggravator, was not a valid aggravator in domestic battery case).

C.f. Buchanan v. State, 767 N.E.2d 967, 971 (Ind. 2002) (proper to rely upon the age of a victim of child molesting as aggravating factor even though age is element of crime, because court specifically found victim was of "particularly tender years"); see also Kien v. State, 782 N.E.2d 398 (Ind. Ct. App. 2003).

1. Improper Factors

In child seduction cases, Defendant's position of trust with the victim.[92]

Fact that defendant disseminated photos of his four-year-old child over internet to enhance child exploitation counts.[93]

Defendant's prior unrelated misdemeanors are at best "marginally significant" in context of molestation.[94]

It is not aggravator for D, in good faith, to consistently maintain his innocence.[95]

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[91] Gomillia v. State, 13 N.E.3d 846, 852-53 (Ind. 2014) (quoting Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007)).

[92] Asher v. State, 790 N.E.2d 567 (Ind. Ct. App. 2003).

[93] Hart v. State, 829 N.E.2d 541 (Ind. Ct. App. 2005).

[94] Ruiz v. State, 818 N.E.2d 927 (Ind. 2004) and Francis v. State, 817 N.E.2d 235 (Ind. 2004).

[95] Bluck v. State, 716 N.E.2d 507 (Ind. Ct. App. 1999).

Impact on Victim and Victim's family.[96]

Risk of spreading HIV in child molest case could not be considered aggravating factor where no evidence on record that D had HIV, knew he had HIV or received risk counseling.[97]

Absence of physical harm to victim is not a mitigator.[98]

2. Proper Factors

Age of a victim of child molesting as an aggravating factor, even though age is an element of the crime, especially where the court finds the victim of "particularly tender years."[99]

> C.f. Buchanan v. State, 767 N.E.2d 967, 971 (Ind. 2002) (proper to rely upon the age of a victim of child molesting as aggravating factor even though age is element of crime, because court specifically found victim was of "particularly tender years"); see also Kien v. State, 782 N.E.2d 398 (Ind. Ct. App. 2003).

It is appropriate to order a defendant to submit to a pre-sentence psychosexual evaluation as part of a pre-sentence investigation or to rely on it at sentencing.[100]

Failure to show remorse.[101]

Although courts will look at benefit derived by a D from dismissal of charges in a plea agreement, courts will do so with a practical eye towards discouraging the obvious overcharging of Ds; here court should have considered mitigating effect of plea.[102]

B. Suspendibility

Laney v. State, 868 N.E.2d 561 (Ind. Ct. App. 2007) (trial court properly concluded that any portion of D's sentence below the minimum six-year sentence for class B felony child molesting was non suspendible, regardless of fact that she was convicted as an accessory rather than the actual perpetrator).

Miller v. State, 943 N.E.2d 349 (Ind. 2011) (I.C. 35-50-2-2(i) specifies that only the portion of a sentence for class A felony child molesting that exceeds 30 years may be suspended, but the statute does not require a minimum sentence of thirty years; Ind. Code 35-50-2-1(c)(2) defines

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[96] Simmons v. State, 746 N.E.2d 81 (Ind. Ct. App. 2001) and Leffingwell v. State, 793 N.E.2d 307 (Ind. Ct. App. 2003).

[97] White v. State, 647 N.E.2d 684 (Ind. Ct. App. 1995) and Ridenour v. State, 639 N.E.2d 288 (Ind. Ct. App. 1994).

[98] Neale v. State, 826 N.E.2d 635 (Ind. 2005).

[99] Buchanan v. State, 767 N.E.2d 967, 971 (Ind. 2002); Francis v. State, 817 N.E.2d 235 (Ind. 2004); and Kien v. State, 782 N.E.2d 398 (Ind. Ct. App. 2003).

[100] Hines v. State, 856 N.E.2d 1275 (Ind. Ct. App. 2006)

[101] Sharp v. State, 951 N.E.2d 282 (Ind. Ct. App. 2011).

[102] Marlett v. State, 878 N.E.2d 860 (Ind. Ct. App. 2007).

the minimum sentence for this offense and sets it at 20 years); see also Hampton v. State, 921 N.E.2d 27 (Ind. Ct. App. 2010).

C. Consecutive Sentences

Trial Court must explain decision as to why aggravating circumstances warrants consecutive sentences as opposed to enhanced concurrent sentences.[103]

Just because the act involves two separate victims does not mean the acts cannot be part of same criminal episode for consecutive sentencing purposes.[104] Thus, where defendant's convictions arise out of a single episode of criminal conduct, the statutory consecutive sentencing cap under Ind. Code § 35-50-1-2 applies.[105]

D. Credit Time

Attempted child molesting is not listed as a qualifying offense in the credit restricted felon statute (Ind. Code § 35-31.5-2-72(1)).[106]

Indiana's credit-restricted felon statute does not apply to a defendant convicted of the "fondling or touching" section of child-molesting statute.[107]

Application of credit restricted felon statute does not implicate the Sixth Amendment right to trial by jury.[108]

E. Indiana Code § 35-50-2-4(c)

Under I.C. § 35-50-2-4(c), a defendant convicted of Level 1 felony child molesting where the defendant is at least twenty-one years of age and the victim is less than twelve may be sentenced according to a longer sentencing range of between 20 and 50 years. To sentence a defendant under this subsection, the jury must have found beyond a reasonable doubt that the child was under age 12. Otherwise, the sentence will violate the Sixth Amendment as stated in Apprendi v. New Jersey, 530 U.S. 466 (2000).[109]

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[103] Harris v. State, 897 N.E.2d 927 (Ind. 2008).

[104] Harris v. State, 861 N.E.2d 1182 (Ind. 2007).

[105] Trei v. State, 658 N.E.2d 131 (Ind. Ct. App. 1995); Grimes v. State, 84 N.E.3d 635 (Ind. Ct. App. 2017); and Vermillion v. State, 978 N.E 2d 459 (Ind. Ct. App. 2012).

[106] Boling v. State, 982 N.E.2d 1055 (Ind. Ct. App. 2013).

[107] McCoy v. State, 96 N.E.3d 95 (Ind. Ct. App. 2018) and Young v. State, 973 N.E.2d 1225 (Ind. Ct. App. 2012).

[108] Holmgren v. State, 196 N.E.3d 281 (Ind. Ct. App. 2022).

[109] Holmgren v. State, 196 N.E.3d 281 (Ind. Ct. App. 2022).

F. Probation/Parole

Conditions of probation should reasonably relate to rehabilitating the defendant and protecting the public. They must also describe with clarity and particularity the misconduct that will result in a defendant being returned to prison.

1. Impermissibly Vague Probation Terms

Prohibiting the probationer from having "contact with any person under age 18."[110]

Requiring the probationer to report any "incidental contact" with children to his probation officer.[111]

Prohibiting a probationer from possessing "pornographic or sexually explicit materials."[112]

Requiring D to notify probation officer of establishment "of a dating, intimate and/or sexual relationship."[113]

Although restricting D from residing two blocks from school or playground is reasonable, restricting Defendant from residing within two block of any area where children congregate is too vague.[114]

Prohibiting contact with the victim's "family" when D is also part of the same family.[115]

2. Overbroad and Unreasonable Terms

Prohibiting all internet use without prior approval of probation officer.[116]

Where probation condition prohibiting D from visiting parks, schools, playgrounds, and day care centers could be read to prohibit D from visiting even parks where children do not congregate, such as state parks, probation order is overbroad and unreasonable.[117]

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[110] Hunter v. State, 883 N.E.2d 1161 (Ind. 2008).

[111] Hunter v. State, 883 N.E.2d 1161 (Ind. 2008).

[112] Foster v. State, 813 N.E.2d 1236, 1237-39 (Ind. Ct. App. 2004) and Fitzgerald v. State, 805 N.E.2d 857 (Ind. Ct. App. 2004).

[113] McVey v. State, 863 N.E.2d 434 (Ind. Ct. App. 2007).

[114] Carswell v. State, 721 N.E.2d 1255 (Ind. Ct. App. 1999).

[115] Phipps v. State, 177 N.E.3d 123 (Ind. Ct. App. 2021).

[116] Weida v. State, 94 N.E.3d 682 (Ind. 2018).

[117] Fitzgerald v. State, 805 N.E.2d 857 (Ind. Ct. App. 2004).

3. Restitution

Trial court committed fundamental error in ordering D to pay victim's unspecified, future counseling and therapy costs.[118]

4. Miscellaneous

Rodriguez v. State, 714 N.E.2d 667 (Ind. Ct. App. 1999) (condition of home detention that D could not have in-home visitation with daughter was proper because court explained that condition was to protect child and mother of child, who was victim of D's crime for which he was place on home detention).

Collins v. State, 911 N.E.2d 700 (Ind. Ct. App. 2009) (trial court did not err by adding conditions to D's probation previously ordered in 2000, pursuant to I.C. 35-38-2-1.8).

Gilfillen v. State, 582 N.E.2d 821 (Ind. 1991) (where D was found guilty of child molesting at trial, but steadfastly protested his innocence, it was error to revoke his probation for failure to successfully complete sex abuse counseling due to his refusal to admit he had problem).

Gaither v. Indiana Dept. of Correction, 971 N.E.2d 690 (Ind. Ct. App. 2012) (probation condition requiring D, a sex offender, to not reside within 1,000 feet of a school, did not violate prohibition on ex post facto laws, even though statute requiring sex offenders to register was not enacted until several years after D committed offenses, because the only limitation on trial court's discretion in fashioning terms of probation is that conditions reasonably relate to Defendant's treatment and public safety).

Jones v. State, 885 N.E.2d 1286 (Ind. 2008) (Indiana's sexually violent predator statute, I.C. 35-38-1-7.5, does not authorize trial court to initiate an SVP determination for the first time during a probation revocation proceeding).

Ripps v. State, 968 N.E.2d 323 (Ind. Ct. App. 2012) (trial court abused its discretion by revoking 69-year-old terminally ill probationer and ordering him to serve the entire suspended portion of his Class C felony child molesting sentence after moving to an assisted living facility 980 feet away from a public library in violation of his residency restrictions).

Morales v. State, 991 N.E.2d 619 (Ind. Ct. App. 2013) (trial court did not abuse its discretion in denying D's motion for placement into Vanderburgh County Forensic Diversion Program, because Program would not accept any sex offenders).

Patrick v. Butts, 12 N.E.3d 270 (Ind. Ct. App. 2014) (Parole Board's order that D participate in Sex Offender Management and Monitoring program did not violate ex post facto clause of Indiana constitution).

[118] Bennett v. State, 862 N.E.2d 1281 (Ind. Ct. App. 2007).

G. Appropriateness of sentence under Ind. Appellate Rule 7(B)

Ind. Appellate Rule 7(B) provides that an appellate court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." This formulation places central focus on role of trial judge, while reserving for appellate court the "chance to review the matter in a climate more distant from local clamor."[119]

Evaluation of a defendant's sentence may include consideration of his status as a credit-restricted felon because this penal consequence was within the contemplation of the trial court when determining the sentence.[120]

Consecutive sentences for repeated child molest of the same victim often result in an inappropriate sentence warranting revision to concurrent terms.

But see Faith v. State, 131 N.E.3d 158 (Ind. 2019) (finding Court of Appeals' revision of consecutive sentence from 90 to 30 years "wholly inadequate under the circumstances," and revising D's sentences to the original consecutive 30-year terms, with 30 years suspended, for an executed sentence of 60 years).

1. Other Appellate Sentencing Revision Examples:

Buchanan v. State, 767 N.E.2d 967 (Ind. Ct. App. 2002) (while absence of brutality does not in any way lessen severity of sexual assault crimes, presence of aggravated brutality distinguishes Ds who commit such acts and justifies substantially aggravated term where it is present; here, Court reduced D's sentence from 50 to 40 years).

Smith v. State, 889 N.E.2d 261 (Ind. 2008) (presumptive, consecutive sentences resulting in 120 years for four counts of child molesting was inappropriate in light of D's poor mental health and fact that his Class D felony child molesting conviction was 10 years prior to instant offenses; sentence reduced to 60 years).

Mishler v. State, 894 N.E.2d 1095 (Ind. Ct. App. 2008) (50 year aggregate sentence for two class A felony child molesting convictions reduced to 38 years, where State conceded at oral argument that nature of offenses & D's character was not among the worst).

Sanchez v. State, 938 N.E.2d 720, 723 (Ind. 2010) (80-year sentence for three counts involving D rubbing two of his step-daughters' vaginas inappropriate and reduced to 40 years where significant force not used and D had a relatively minor criminal history).

Hamilton v. State, 955 N.E.2d 723 (Ind. 2011) (D's 50-year sentence for one Class A felony count of molesting his 9-year-old step-granddaughter was inappropriate).

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[119] Serino v. State, 798 N.E.2d 852, 856-57 (Ind. 2003).

[120] Sharp v. State, 970 N.E.2d 647 (Ind. 2012).

Horton v. State, 949 N.E.2d 346 (Ind. 2011) (324-year sentence for nine counts of child molesting reduced to 110 years).

Carter v. State, 31 N.E.3d 17 (Ind. Ct. App. 2015) (98-year executed sentence for three Class A and two Class C felony child molesting convictions was "out of range of appropriate results," even where D occupied a position of trust with C.W. and his offenses were "undeniably serious"; court revised to an aggregate sentence of 68 years).

But see:

Haddock v. State, 800 N.E.2d 242 (Ind. Ct. App. 2003) (distinguishing Serino and affirming D's 326-year sentence for multiple counts of child molesting, confinement, and vicarious sexual gratification, with acts occurring over several years and accompanied by bondage, violence, and threats to hurt or kill victims or their mother).

Leffingwell v. State, 810 N.E.2d 369 (Ind. Ct. App. 2004) (maximum eight year sentence for class C felony child molesting was appropriate, where D violated conditions of his bond & violated position of trust he held with his ten year old step daughter).[121]

XII. DOUBLE JEOPARDY

When a defendant's single act or transaction implicates multiple statutes, the test for resolving double jeopardy claims depends on a two-part inquiry. First, the Court first decides whether one charged offense encompasses another charged offense under the included-offense statutes; second, the Court must look at the underlying facts, as alleged in the information and adduced at trial, to determine whether the charged offenses are the same.[122]

When each sex offense is a separate and distinct act, multiple convictions do not violate double jeopardy.[123]

Koziski v. State, 172 N.E.3d 338 (Ind. Ct. App. 2021) (two convictions for Level 1 felony child molesting against same victim for acts that fell under separate provisions of "other sextual conduct" as defined in in IC 35-31.5-2-221.5 did not constitute double jeopardy under Wadle).

Carranza v. State, 184 N.E.3d 712 (Ind. Ct. App. 2022) (two convictions for child molesting by "other sexual conduct" and by "fondling or touching" did not violate double jeopardy test of Wadle).[124]

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[121] See also Scott v. State, 771 N.E.2d 718 (Ind. Ct. App. 2002) and Haycroft v. State, 760 N.E.2d 203 (Ind. Ct. App. 2001).

[122] Wadle v. State, 151 N.E.3d 227 (Ind. 2020) (overruling Richardson v. State, 717 N.E.2d 32 (Ind. 1999)).

[123] Koziski v. State, 172 N.E.3d 338 (Ind. Ct. App. 2021).

[124] See also Sorgdrager v. State, 2023 WL 2921370 (Ind. Ct. App. 2023).

Adams v. State, 804 N.E.2d 1169 (Ind. Ct. App. 2004) (the sale of four videotapes to a detective constituted one act of distribution of obscene matter).

Wright v. State, 590 N.E.2d 650 (Ind. Ct. App. 1992) (where D forced victim to commit oral sex, did same on victim, and forced victim to lie on top of sister, all in the course of one day, each occurrence was a distinct offense and three separate convictions of child molesting and vicarious sexual gratification was not double jeopardy).[125]

Vermillion v. State, 978 N.E 2d 459 (Ind. Ct. App. 2012) (no double jeopardy violation for two convictions of sexual misconduct with a minor arising from D's separate but continuing efforts to touch C.W., who repeatedly requested that D stop touching her).

Seal v. State, 38 N.E.3d 717 (Ind. Ct. App. 2015) (D's convictions for class A felony child molesting and class B felony sexual misconduct with a minor do not qualify for merger under the continuing crime doctrine where D engaged in sexual conduct with his daughters over five years; the continuous crime doctrine applies only where a defendant has been charged multiple times with the same 'continuous' offense, i.e., an offense considered "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction").

Double jeopardy does not bar retrial where State fails to prove venue; it is preferable to challenge venue before trial, with the result of a successful challenge being transferred to the proper county, not dismissal of charges.[126]

XIII. POST-CONVICTION RELIEF

Hinesley v. State, 999 N.E.2d 975 (Ind. Ct. App. 2013) (in bench trial for child molesting, D was not denied effective assistance of trial counsel due to counsel's deliberate strategic choice to permit trial judge to consider as substantive evidence hearsay statements attributed to C.W. The hearsay was admissible for impeachment purposes, and defense counsel hoped that allowing all the statements into evidence and demonstrating the inconsistencies among the multiple statements would work to D's advantage to show witnesses' motive to fabricate and to create reasonable doubt).

McCullough v. State, 973 N.E.2d 62 (Ind. Ct. App. 2012) (in 2-1 opinion, court rejected IAC claim even though counsel failed to: 1) introduce evidence proving C.W.'s prior claim was false; 2) object to C.W.'s accusations of prior conduct; 3) cross-examine DCS interviewer and police detective regarding custody battle between D and C.W.'s mother; 4) make an offer of proof to preserve a valid issue regarding the trial court's curtailment of D's investigator's testimony; 5) present evidence that Mother coached C.W.'s sister to make a molest accusation which was later recanted; 6) present evidence of Mother's motive to coach children, i.e., her arrest one

[125] See also Minton v. State, 802 N.E.2d 929 (Ind. Ct. App. 2004); and Ward v. State, 736 N.E.2d 265 (Ind. Ct. App. 2001).

[126] Neff v. State, 915 N.E.2d 1026 (Ind. Ct. App. 2009).

month before the accusations for failing to pay D child support; and 7) request an instruction regarding child hearsay).

Adcock v. State, 22 N.E.3d 720 (Ind. Ct. App. 2014) (Appellate counsel was ineffective for failing to challenge D's two Class A felony child molesting convictions and two Class B felony sexual misconduct with minor convictions; Court found lack of proof as to C.W.'s age with respect to a child molesting charge, where victim could only testify that the sexual abuse occurred while she was in junior high school; moreover, the evidence did not establish that these acts occurred within five years before the filing of the charging information, as required by the statute of limitations; total absence of evidence of penetration was plain and obvious on the face of the record).

Baumholser v. State, 186 N.E.3d 684 (Ind. Ct. App. 2022) (trial counsel ineffective for failing to move to dismiss Class C felony charges at trial when State rested its case because State's evidence showed statute of limitations had passed by the time D was charged).

XIV. SEX OFFENDER REGISTRY/SEXUALLY VIOLENT PREDATOR

See IPDC Sex Offender Registry Pamphlet, published December 2018.